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SUPREME COURT

MAY 2002 TERM

STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS AND THE WORKERS' COMPENSATION APPELLATE COMMISSION

JEFFREY L. FRAZZINI,

Plaintiff-Appellee,

and

AAA OF MICHIGAN,

Intervening Plaintiff-Appellee,

vs

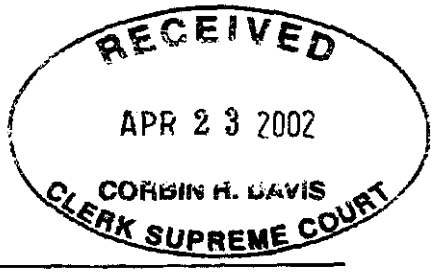
TOTAL PETROLEUM INCORPORATED, Self-Insured,

Defendant-Appellant.

Supreme Court: 119362

Court of Appeals: 223684

Lower Court: WCAC No. 980260



BRIEF ON APPEAL -- PLAINTIFF-APPELLEE

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COUNTER-STATEMENT OF BASIS OF JURISDICTION

Plaintiff accepts defendant's statement of the basis for this Court's jurisdiction, although citation to MCL 418.861a(14) would probably also be appropriate.

STATEMENT OF QUESTION PRESENTED

DID PLAINTIFF'S INJURIES ARISE OUT OF HIS EMPLOYMENT BECAUSE THE REQUIREMENT THAT HE DRIVE AS A PART OF HIS JOB CONTRIBUTED TO AND INCREASED THE INJURIES HE SUSTAINED WHEN HE EXPERIENCED AN INSULIN REACTION?

Plaintiff-Appellee answers "YES."
The WCAC answered "NO."
The Court of Appeals answered "YES."

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119362

Court of Appeals:
223684

Lower Court:
WCAC No. 980260

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

(Numbers in parentheses followed by "a" shall refer to pages of defendant-appellant's appendix. Numbers followed by "b" shall refer to pages of plaintiff-appellee's appendix.)

The proceedings described below were initiated upon the filing by plaintiff Jeffrey L. Frazzini of an application for mediation or hearing dated May 2, 1996,

alleging severe and disabling injuries to his right hip, right knee, heart, and mental state as the result of an automobile accident occurring on May 19, 1994 (1b).

Plaintiff is an insulin-dependent diabetic (169a). On the date of his injury, he was a manager at defendant Total Petroleum, Incorporated's at its Howell store (137a). His duties included preparing and delivering daily bank deposits twice a day (162a-163a).

At lunch on May 19, 1994, plaintiff took a sandwich from defendant's cooler and cooked it in the microwave, only to discover that it was spoiled (171a). This understandably ruined his appetite (171a). Although he was "feeling a little funny," he figured that his shift was almost over so that he would go to the bank and then go home (171a).

Plaintiff made the deposit (167a). He then got back in his car to go to Wal-Mart to buy name tags, because his boss had recently complained that the cashiers lacked such tags (171a-172a). As he left the bank, plaintiff was still "feeling funny," but figured that he could get something to eat at Wal-Mart (176a).

However, as he drove towards Wal-mart, plaintiff began to feel "like I was in a video game" (173a). He ended up getting into an accident as a result (173a). A bag of change was recovered from the car (128a-129a).

Plaintiff was taken to the University of Michigan Hospital (177a). He subsequently underwent a total hip replacement, and was having problems with his left arm and shoulder as well (178a-179a). He attributed the latter problems to the use of a crutch and cane (179a).

Dr. Gary Ferenchik, plaintiff's treating internist (51a-52a), testified that his patient suffered from diabetes (54a). When provided with a hypothetical accurately detailing the events of plaintiff's day leading up to his accident, Dr. Ferenchik stated, "That is a symptom complex consistent with hypoglycemia" (55a-56a). He indicated that hypoglycemia can initially cause what is known as the "fight or flight phenomena," adding, "Anxiousness, sweating, elevated heart rate, elevated blood pressure, feelings of hunger, would be the primary symptoms" (57a). Thereafter, he stated, the diabetic would experience neuroglycopenia, explaining: "That's where the brain starts getting involved, as the brain requires glucose for its function. People who are neuroglycopenic can have a variety of symptoms, extending anywhere from aberrant and irrational behavior to frank coma and unconsciousness" (57a-58a). The probability that plaintiff had reached the neuroglycopenia stage at the time of his accident was "quite high" (58a).

In a decision mailed from the Bureau on March 30, 1998, Magistrate Crary Grattan held that plaintiff had established that his injury was work-related:

> "Obviously, plaintiff's diabetes and insulin reaction did not arise out of plaintiff's employment. Therefore, defendant argues, this puts the matter in the line of cases which have come to be known as 'idiopathic fall' cases. The general rule in this line of cases is that if the employment did not cause the fall, or increase the danger encountered in falling, the resulting injury is not compensable. However, this line of cases also holds that if the work increased the danger involved in falling, the injury is compensable. Although the instant case does not involve a fall, the principle is the same. The question is: Does driving a vehicle increase the danger to the driver if the driver is suddenly incapacitate[d] by a non-work related condition such as an insulin reaction? The answer to this

> question is obviously yes. I therefore find that plaintiff's injury did arise out of and in the course of his employment." (388a)

The magistrate granted an open award of benefits accordingly. Intervening plaintiff AAA of Michigan, the no fault carrier, was found "entitled to recoupment for benefits paid." (391a)

Defendant filed a timely appeal from this determination with the Workers' Compensation Appellate Commission ["WCAC"], after which plaintiff cross-appealed. In an order and opinion dated October 26, 1999, the WCAC reversed the magistrate's decision, writing:

> "We similarly find the instant case is a personal risk case and that the risk emanates from plaintiff's non-work-related diabetic condition. We find the magistrate legally erred in finding that the mere act of plaintiff's driving a vehicle in the course of employment increased the risk of injury. We carefully examined the record and while duly cognizant of the deference to be given to the decision of the magistrate find grounds for reversal upon application of *Ledbetter [v Michigan Carton Co*, 74 Mich App 330; 253 NW2d 753 (1977)] *and Auto Club of Michigan*[1] to the found facts of this case. Therefore, we reverse the magistrate's decision." (396a) (footnote omitted).

The Court of Appeals granted leave to appeal on April 28, 2000 (399a). The Clerk was directed "to submitted this case with Docket No. 221335 [*Hill v Faircloth Mfg Co*]," and the two cases were subsequently formally consolidated (400a).

In an opinion dated May 11, 2001, the Court of Appeals reversed the WCAC's decision, reasoning as follows:

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[1]This is a reference to *Hill v Faircloth Mfg Co*, the companion case to the instant matter. The Automobile Club of Michigan is an intervening plaintiff in *Hill*.

> "The cases before us are analogous to those in which an employee suffers greater injuries because the collapse occurs while standing on a ladder or near a piece of machinery. Driving a vehicle for their employers increased the level of risk involved in Hill and Frazzini's diabetic seizures and loss of consciousness. Further, both sustained injuries more severe than those they would suffer had they simply blacked out while standing on a level floor at work. In sum, their disabling or aggravated injuries were directly related to the vehicular accidents rather than to diabetes, even though the diabetes caused the accidents to occur." (407a)

This Court granted leave to appeal on January 23, 2002 (409a).

SUMMARY OF ARGUMENT

The statute under consideration, MCL 418.301(1), requires that the *injury*, not the accident, arise out and in the course of employment. Consequently, the fact that plaintiff's accident may have been caused by his nonwork-related diabetic reaction is not legally dispositive, because his injuries were caused by the fact that his employment placed him in a moving car when he had the reaction.

This outcome is consistent with the rule uniformly applied across the nation, 1 Larson's Workers' Compensation Law (Matthew Bender & Co, 1999), at 9-1, *et seq*, as well as with the Court of Appeals' opinion in *Ledbetter v Michigan Carton Co*, 74 Mich App 330, 333; 253 NW2d 753 (1977). *Ledbetter*, when applied properly as it was below, requires a finding that the injury arose out of the employment when the employment contributed to or worsened the severity of the injury, even if the accident leading to the injury was initially the result of an idiopathic condition.

Defendants would rely upon *Van Gorder v Packard Motor Car Co*, 195 Mich 588; 162 NW 107 (1917), but that case is based upon outmoded and superseded

legal concepts requiring that a claimant establish that his injury was "accidental" -- a requirement now abolished by the Legislature. *Sheppard v Michigan National Bank*, 348 Mich 577; 83 NW2d 614 (1957). In addition, *Van Gorder* was based upon a misconception of the English cases upon which it was based.

Any test requiring the comparison of employment risks to everyday risks is unsupported by any statutory language, represents a return to an abolished prerequisite to compensability, and is unworkable.

The Court of Appeals correctly decided this matter, and its opinion should be affirmed accordingly.

ARGUMENT

PLAINTIFF'S INJURIES AROSE OUT OF HIS EMPLOYMENT BECAUSE THE REQUIREMENT THAT HE DRIVE AS A PART OF HIS JOB CONTRIBUTED TO AND INCREASED THE INJURIES HE SUSTAINED WHEN HE EXPERIENCED AN INSULIN REACTION.

Standard of Review. Defendant Total's statement of this Court's standard of review is both incorrect and incomplete. While the appellate courts' factual review powers are limited, *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000), they may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. *DiBenedetto v West Shore Hospital*, 641 Mich 394; 605 NW2d 300 (2000); *Oxley v Dep't of Military Affairs*, 460 Mich 536; 597 NW2d 89 (1999).

Furthermore, defendant Total vastly overstates the degree of deference due an administrative agency's interpretation of statutes. As the Court wrote in *DiBenedetto, supra*, at 401, "This Court reviews questions of law involved in any final order of the WCAC under a de novo standard of review." The Court further wrote, in *Ludington Service Corp v Acting Comm'r of Ins*, 444 Mich 481, 503-504; 511 NW2d 661 (1994), as follows:

> "Finally, while this Court affords deference to an agency's findings of fact, we can always review an agency's legal findings. Both the Michigan Constitution and the applicable statute permit this Court to set aside the commissioner's findings if they are '[i]n violation of the constitution or a statute,' or '[a]ffected by other substantial and material error of law.' *Southfield Police, supra*, 433 Mich at 175, 445 NW2d 98, citing MCL 24.306(1)(a), (f); MSA 3.560(206)(1)(a), (f)."

Consequently, this Court need not defer to an erroneous legal interpretation. The authorities cited by defendant Total, *Mudel, supra*, and *Holden v Ford Motor Co*, 439 Mich 257; 484 NW2d 227 (1992), deal with the degree to which the courts must defer to *factual* rather than legal findings.

However, there is no dispute as to the basic facts in this case. Plaintiff Frazzini suffered a diabetic reaction while driving in the course of his employment, and sustained an accident and severe injuries as a result. What is at issue are the *legal* consequences of these facts.[2] As noted above, that is fully within the power of this

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[2]In the companion case, defendant Faircloth Manufacturing contends that the Court of Appeals impermissibly overturned additional facts, relative to whether the claimants' employment was "unusually dangerous" or "a place of extreme hazard." Defendant Faircloth's Brief, at 17-19. However, the Court of Appeals held that this was *not* the appropriate test, and did not have to reverse findings of fact as to the

Court to review, just as it was within the review powers of the Court of Appeals below.

A. The language of the provision at issue makes it clear that the issue is whether the claimant's *injury*, and not his accident, arose out of and in the course of his employment.

The statute relevant to this litigation, MCL 418.301(1), carries the following basic prerequisite to compensability:

> "An employee, who receives *a personal injury arising out of and in the course of employment* by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in the act." (emphasis supplied)

There is no dispute that plaintiff Frazzini's injury arose in the course of his employment with defendant Total. As a result, this brief will focus on the "arising out of" requirement.[3]

In that regard, it is important to note what must arise out of the employment -- "*a personal injury.*" It is not the accident that must arise out of the employment, but instead the injury itself. As a consequence, it is not critical that plaintiff's personal diabetic condition caused the accident to occur. What is legally important is whether the injuries that resulted arose out of the employment. They clearly did, because

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nature of the risk before reversing the WCAC's conclusion.

[3]It has been suggested that these are not two separate requirements, but are instead merely one integrated standard. See, *e.g.*, *Simkins v General Motors Corp*, 453 Mich 703, 712, n 14; 556 NW2d 839 (1996). However, resolution of that particular issue is not necessary in this matter, where plaintiff's injury clearly *did* arise both out of *and* in the course of his employment.

plaintiff would not have been injured at all, or at least not as severely, had he not been driving in the course of his employment at the time his diabetic reaction occurred.

In that regard, an examination of decisions rendered by courts in other states is instructive.

For example, in *Bennett v Wichita Fence Co*, 16 Kan App 458; 824 P2d 1001 (Kan App, 1992), the Kansas Court of Appeals considered a claim by an employee who had an epileptic seizure while making a delivery in a company vehicle. The Court noted that, while the seizure was personal to the employee, the injuries were a combination of that personal event *and* the employment-imposed travel:

> "Professor Larson now states there is general agreement that the effects of a fall are compensable if conditions of employment place the employee in a position increasing the effects of a fall, such as in a moving vehicle. 1 Larson's Workers' Compensation Law § 12.11 (1990).
>
> "Assuming claimant had a seizure and lost consciousness, the fact he was driving the employer's vehicle in the course of his employment subjected him to the additional risk of travel. While the seizure was personal to claimant, the risk of travel arose out of the employment and the two concurred to produce the injuries." *Id*, at 460 (5b).

Similarly, in *National Health Laboratories v Industrial Claim Appeals Office of Colorado*, 844 P2d 1259 (Colo App, 1992), the Colorado Court of Appeals applied the same general rule to another case in which the employee suffered an epileptic seizure while driving incidental to his employment. The *National Health Laboratories* Court found it significant that the claimant's injuries were the result not of his personal epilepsy, but instead of the added element of vehicular travel imposed by his employment:

> "Here, the claimant sustained severe multiple injuries not from the epileptic attack itself, but because she was traveling by automobile in the course and scope of her employment at the time of her attack. Although the epileptic seizure was personal to the claimant, the added risk of vehicular travel arose from her employment.
>
> "We therefore conclude that the injuries sustained by the claimant as a result of the accident, as distinguished from physical impairments which may have resulted solely from her seizure, were injuries that arose out of her employment." Id, at 1261 (8b-9b).

As these cases and their incorporated analyses indicate, the fact that a nonwork-related or personal condition may have contributed to the accident, or even set it in motion, *is not dispositive. The injuries in the above cases and the instant* matter were contributed to as well by the fact that work placed the employees in a car when they suffered their reactions, and therefore contributed to the resultant injuries. This is entirely consistent with a statute focusing on the causation of the *injury*, and not the accident. MCL 418.301(1).

Defendants would impose yet another requirement -- some kind of analysis of the "risk of injury" imposed by the employment, with the idea that a risk no greater than that faced by an individual in "everyday life" would not be compensable. However, the statute does not include the word "risk," nor does it require or authorize any type of quantitative analysis of the risks presented by the employment.[4] This

[4]As shall be discussed further below, this is a concept more appropriate to that era in which Michigan workers' compensation law required the occurrence of an "accident."

Court has held that it "cannot write into the statutes provisions that the legislature has not seen fit to enact." *Paselli v Utley*, 286 Mich 638, 643; 282 NW 849 (1938).

B. The analysis set forth above and applied by the Court of Appeals below is consistent with the uniform rule of law applied across the nation.

In his treatise, often cited by this and other Courts when it comes to difficult workers' compensation issues, Professor Larson has set forth the general rule applicable in cases like this one:

> "Injuries arising out of risks or conditions personal to the claimant do not arise out of the employment unless the employment contributes to the risk or aggravates the injury. When the employee has a preexisting physical weakness or disease, this employment contribution may be found either in placing the employee in a position which aggravates the effects of a fall due to the idiopathic condition, or in precipitating the effects of the condition by strain or trauma." 1 Larson's Workers' Compensation Law (Matthew Bender & Co, 1999), at 9-1.

In fact, Professor Larson indicated that there was "general agreement" that a situation like that in the instant case is compensable, while the real controversy concerned the much more limited question of whether a fall on a level floor can be compensable:

> "When an employee, solely because of a nonoccupational heart attack, epileptic fit, or fainting spell, falls and sustains a skull fracture or other injury, the question arises whether the skull fracture (as distinguished from the internal effects of the heart attack or disease, which of course are not compensable) is an injury arising out of the employment.
>
> "The basic rule, on which there is now general agreement, is that the effects of such a fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on

> a height, near machinery or sharp corners, *or in a moving vehicle*. The currently controversial question is whether the effects of an idiopathic fall to the level ground or bare floor should be deemed to arise out of the employment." *Id*, §9.01, at 9-2 (emphasis supplied).[5]
>
> * * *
>
> "*Awards are uniformly made when the employee's idiopathic loss of his or her faculties took place while he or she was in a moving vehicle*." Larson, supra, §9.01[2], at 9-3 (emphasis supplied; footnote omitted).

Not only is the rule defendants propound inconsistent with the controlling statute, but it is also out of touch with jurisprudence throughout the *entire* United States. There simply is no dispute that such claims are compensable.

Defendant, however, criticizes the Court of Appeals' reliance upon Professor Larson's treatise, which it correctly states has not been enacted into Michigan law. However, that treatise has frequently and consistently been relied upon by this Court in interpreting workers' compensation law.[6] Quite plainly, this Court has considered Larson to be a good indicator of the law in this country. That should particularly be the case when, as here, there is "general agreement" and uniformity as to the proposition at issue.

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[5]What was contained in §12 of the treatise at the time of *Ledbetter*'s release is now included in §9.

[6]See, *e.g.*, *Herbolsheimer v SMS Holding Co*, 239 Mich App 236; 608 NW2d 487 (2000); *Hoste v Shanty Creek Mgt Co*, 459 Mich App 561; 592 NW2d 360 (1999); *Camburn v Northwest School District*, 459 Mich 471; 592 NW2d 46 (1999); *Kidder v Miller-Davis Co*, 455 Mich 25; 564 NW2d 872 (1997); and *Simkins v General Motors Corp*, 453 Mich 703; 556 NW2d 839 (1996).

C. The Court of Appeals appropriately utilized the Larson doctrine in *Ledbetter v Michigan Carton Co*, and the Court properly and correctly applied *Ledbetter* in its decision below.

The Court of Appeals adopted the reasoning from Larson's treatise noted above when deciding *Ledbetter v Michigan Carton Co*, 74 Mich App 330, 333; 253 NW2d 753 (1977), which was in turn relied upon by the Court below in this case. In *Ledbetter*, the claimant manifested evidence of a nonwork problem prior to falling and injuring himself on the job:

> "While standing in the locker room, the decedent suddenly began shaking and foaming at the mouth, turned completely stiff, and fell to the floor." *Ledbetter, supra*, at 332.

As a result, the Court characterized his fall as "idiopathic," which it defined as follows:

> "An idiopathic fall is one resulting from some disease or infirmity that is strictly personal to the employee and unrelated to his employment." *Id*, at 333.

However, that was not the end of the inquiry.

Instead, when work increases the severity of injury resulting from an "idiopathic" incident, the *Ledbetter* decision not only permits but *requires* a finding of work-relatedness:

> "In personal risk cases, including idiopathic fall situations, the sole fact that the injury occurred on the employer's premises does not supply enough of a connection between the employment and the injury. Unless some showing can be made that the location of the fall aggravated or increased the injury, compensation benefits should be denied." *Ledbetter, supra*, at 335-336.

The Court explained:

> "It cannot be said with certainty that had the fall occurred at a different location, away from the employer's premises, the injuries would have been less serious.
>
> "This uncertainty distinguishes a level floor case from cases where compensation has been allowed for idiopathic falls from platforms, ladders, or onto some type of machinery. The distinction needs to be drawn, however slight." *Id*, at 337.

This is *not* a requirement that the work risks must be greater than "everyday" risks. Instead, it is merely a statement that the employment must add something to the injury itself. Put another way, the issue is whether the employment increases the severity of the injuries sustained by the employee.

This is *precisely* the rule applied by the Court of Appeals below. The Court wrote:

> "Plaintiffs admit that their seizures caused the accidents but contend that, because their employment placed them in a position that increased the dangerous effects of their seizures and aggravated their injuries, the injuries arose out of their employment within the meaning of the Workers' Disability Compensation Act, MCL 418.301 (1); MSA 27.237(301)(1). Plaintiffs, therefore, do not seek compensation for personal injuries related solely to their diabetic illnesses, but claim that their employers should compensate them for injuries stemming from the traffic collisions. We hold that, if the car accidents occurred in the course of their employment, even if caused by an idiopathic condition, employment-related driving constitutes an increased risk which aggravated the employees' injuries. Accordingly, injuries attributable to the collisions 'arose out of' their employment, entitling the employees to workers' compensation benefits." (403a)

Completely discrediting defendant's contention that the Court below failed to properly apply the *Ledbetter* holding, the Court further wrote:

> "Similar to the instant cases, *Ledbetter* and *McClain* [*v Chrysler Corp*, 138 Mich App 723; 360 NW2d 284 (1984)] concern employees who suffered seizures or fainting spells while at work. However, in *Ledbetter* and *McClain*, the plaintiffs' injuries occurred when they fell to a level, concrete floor after losing consciousness. In both cases, this Court determined that predominantly personal factors caused the falls and that the plaintiffs' employment did not contribute to their injuries. Thus, the cases recognize the general rule that an injury is not necessarily compensable merely because it occurs on an employer's premises. *Ledbetter, supra*, 74 Mich App at 334-335.
>
> "The cases also represent those sometimes referred to as 'level fall' or 'level floor' cases, in which an employee's idiopathic condition causes the employee to fall to level ground. Relying on Larson's treatise on workers compensation law, the *Ledbetter* Court recognized that in 'personal risk' or 'idiopathic fall' cases, '[u]nless some showing can be made that the location of the fall aggravated or increased the injury, compensation benefits should be denied.' *Id.* at 335-336. Referring to Larson, the *Ledbetter* Court drew a distinction between idiopathic falls to a 'level floor' and idiopathic falls from platforms or ladders or onto a piece of machinery. *Id.* at 337...." (405a-406a)

Given this analysis, it is absurd for defendant to argue that the Court of Appeals failed to apply the *Ledbetter* doctrine. The Court obviously followed that doctrine.

Furthermore, the Court made the appropriate distinction between compensable and noncompensable injuries initiated by a personal risk:

> "The cases before us are analogous to those in which an employee suffers greater injuries because the collapse occurs while standing on a ladder or near a piece of machinery. Driving a vehicle for their employers increased the level of risk involved in Hill and Frazzini's diabetic seizures and loss of consciousness. Further, both sustained injuries more severe than those they would suffer had they simply blacked out while standing on a level floor at work. In sum, their disabling or aggravated injuries were directly related to the vehicular accidents rather than to diabetes,

> even though the diabetes caused the accidents to occur." (407a)

Again, this is the correct distinction, consistent with Larson's statements as to precisely the situation involved in this case:

> "The basic rule, on which there is now general agreement, is that the effects of such a fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, *or in a moving vehicle*." 1 Larson's Workers' Compensation Law (Matthew Bender & Co, 1999), §9.01[2], at 9-2 (emphasis supplied; footnote omitted).
>
> * * *
>
> "*Awards are uniformly made when the employee's idiopathic loss of his or her faculties took place while he or she was in a moving vehicle*." Larson, supra, §9.01[2], at 9-3 (emphasis supplied; footnote omitted).

Larson, *Ledbetter*, and the opinion below are all as consistent as they are correct. What is *not* consistent, and what is in fact inconsistent with any other area of workers' compensation law, is the approach taken by the WCAC, later reversed by the Court of Appeals.

The WCAC looked not to whether the workplace increased the *severity* of the injury, but instead to whether it increased the *risk* of an injury. While discussing *Ledbetter*, the WCAC clearly recast the applicable test, initially setting forth an "increased risk" standard [first highlighting], but then purporting to support it by reprinting language calling for an "increased severity" analysis [second highlighting]:

> "Recently in *Auto Club of Michigan v Faircloth Manufacturing Company*, 1999 ACO #389 we affirmed the magistrate's decision denying the plaintiff's claim solely on the basis of its failure to meet the burden of showing that

the accident in that case arose out of and in the course of employment. In *Auto Club of Michigan* we held in pertinent part as follows:

> "*In [Ledbetter], the Court ruled that employment has to increase the risk of injury in a personal risk situation in order for the injury to be compensable.* The Court noted that the Supreme Court in *Whetro v Awkerman*, 383 Mich 235 (1970) did not 'set forth the rule that any trauma suffered by an employee while on the employer's premises or while on company business is necessarily compensable.' The Court emphasized that 'some other connection between the employment and the injury must be shown.' There is a 'requirement that the employment be connected to the injury by way of aggravating or accelerating the harm.' *In a personal risk case, there must be a showing 'that the location of the [injurious event] aggravated or increased the injury.'* Employers should not be held responsible for 'injuries predominantly personal to the employee.'" (395a) (emphasis supplied).

Clearly, the test the WCAC was applying was *not* the test set forth in *Ledbetter*, as the language it itself reprinted makes undeniably clear. There is a significant difference between risk and severity of injury.

In that regard, the *Ledbetter* Court repeatedly and consistently focused upon the need to prove increased severity of harm:

> "Unless some showing can be made that the location of the fall aggravated or increased the injury, compensation benefits should be denied." *Ledbetter, supra*, at 335-336.
>
> * * *
>
> "To shift the loss in the idiopathic-fall cases to the employment, then, it is reasonable to require a showing of at least

> some substantial employment contribution to the harm." *Ledbetter, supra*, at 336, quoting from Larson.
>
> * * *
>
> "It cannot be said with certainty that had the fall occurred at a different location, away from the employer's premises, the injuries would have been less serious." *Ledbetter, supra*, at 337.

In each of these quotations, the *Ledbetter* Court spoke of the severity of the harm done, *not* the risk of same. The WCAC obviously misconstrued the test.

However, the WCAC's error did not end there. It went on to further mutate the test, to require not only an increased risk but also one that went "beyond the common risks of everyday life":

> "In order for an injury to be compensable, the risk posed by the employment situation must go beyond the common risks of everyday life. This was recognized in *Ledbetter* where the Court, upholding the denial of benefits, noted that 'it cannot be said with certainty that had the fall occurred at a different location, away from the employer's premises, the injuries would have been less serious.' It likewise cannot be said in this case. Driving, whether for personal purposes or to go to or from work, is at the heart of everyday life. It is something most people do every day." (396a)

Tellingly, the WCAC cited no authority for such a test, nor is there any.

The general scheme for compensability in workers' compensation is two-fold:

> "Unless the work has accelerated or aggravated the illness, disease or deterioration and, thus, contributed to it, or the work, coupled with the illness, disease or deterioration, in fact causes an injury, compensation is not payable." *Kostamo v Marquette Iron Mining Co*, 405 Mich 105, 117; 274 NW2d 411 (1979).

This bedrock principle for compensability in workers' compensation matters is precisely the test applied in this case. It is a contribution to the injury itself, not the risk that it will occur, that makes that injury compensable.

D. The standard defendants propound, from *Van Gorder*, would lead to absurd determinations which would effectively represent the reconstitution of the "accident" requirement expressly written out of the Act decades ago.

Defendants ask that this Court apply *Van Gorder v Packard Motor Car Co*, 195 Mich 588; 162 NW 107 (1917), a 1917 decision never expressly overruled by the Court. In essence, defendants seek an analysis which would find compensable only those injuries caused by "unusually dangerous" situations or involving employment-related risks greater than those faced in "everyday life."

This analysis is out of step with current law, ignores the development of workers' compensation jurisprudence over the last several decades, and is based upon a decision that was mispremised from the start.

At the time *Van Gorder* was released in 1917, the Workers' Disability Compensation Act ["WDCA"] required not only a showing that an injury arose out of and in the course of employment, but also that the injury was the result of an "accident." See *Adams v Acme White Lead & Color Works*, 182 Mich 157; 148 NW 485 (1914). In *Savage v City of Pontiac*, 214 Mich 626, 633; 183 NW 798 (1921), the Court defined an "accidental injury" as follows:

> "We have been unable to find a case under any statute similar to our own, providing for compensation for 'accidental injuries,' where compensation has been awarded an employee for an injury received in the course of his

> employment, through purely natural causes, where the employee was no more subject to the injury than others similarly situated."

This type of definition led to the denial of a claim in *Guthrie v Detroit Shipbuilding Co*, 200 Mich 335; 167 NW 37 (1918), filed by the dependents of a man who died from mitral regurgitation after lifting on the job. The Court held that the death was not the result of an "accident," where the work being done was not unusually strenuous or beyond that other employees were called upon to perform:

> "Upon the subject of strain: Deceased was a machinist, and was employed to do any machine work that the foreman or the superintendent directed him to do. The work that he was doing at the time of his death was ordinary work, the same class of work he was doing before, apparently no more strenuous than his other jobs. This cover that they were lifting had been lifted off the shaft by two men earlier in the day. There is no testimony in the record to warrant a finding that there was anything especially heavy about the work deceased was doing. In fact, the testimony of the physician for claimant negatives any such inference. There was no showing in the evidence that deceased made any special effort or strain; he was merely helping to lift the cover, which was not extraordinarily heavy, and there is no testimony that he strained himself, or that the lift was heavier than ordinary. We think, therefore, it cannot be claimed that there was anything fortuitous in the lifting of the cover; and there was nothing fortuitous about the work." *Id*, at 358-359.

In *Hopkins v Michigan Sugar Co*, 184 Mich 87; 150 NW 325 (1915), this sort of analysis resulted in the denial of the claim of an employee who was injured when he slipped and fell on ice while in the course of his employment. The Court held that this was "a hazard to which he, in common with others, would have been equally exposed apart from the employment." *Id*, at 92. The Court reasoned, "No direct

causal relation is claimed in the particular that the nature of the business of manufacturing sugar in itself exposes its employees to unusual risk or danger of accident of this nature." *Hopkins, supra*, at 92.

Similarly, in *Stombaugh v Peerless Wire Fence Co*, 198 Mich 445; 164 NW 537 (1917), the Court denied benefits even where it expressly held that the employee's death was hastened by on-the-job exertion, because there was no "accident." Nothing fortuitous or unexpected occurred, so as to transform the exertion into an "accident." Instead, the man was simply doing his work as he normally did:

> "The man died while doing the work he agreed to do, in the way he intended to do it. The exercise accounts for his death, and if he had been informed about the condition of his heart, he must have known that death was likely to result, at any time, from any considerable physical exertion. There is no evidence of mischance or miscalculation in what was being done, none of anything fortuitous or unexpected in the manner of doing it. There is unexpected evidence that he had a chronic trouble -- disease -- of the heart, of long standing, the wall of one auricle being so thin that 'any exertion at all might have been the cause of its breaking.' Death was merely hastened by the exertion." *Id*, at 446.

Quite plainly, precious few of these holdings would be duplicated, were they to be litigated today. However, this was the backdrop for the *Van Gorder* decision. In fact, *Van Gorder* has been cited for the proposition that, absent an accident, no compensation is payable. See, *e.g.*, *Johnson v Mary Charlotte Mining Co*, 199 Mich 218, 221; 165 NW 650 (1917); *Guthrie v Detroit Shipbuilding Co*, 200 Mich 335, 360; 167 NW 37 (1918).

While *Van Gorder* was cited on more than a few occasions after its release, although sometimes only to distinguish it[7], it has not been cited since 1936.[8] The reason? Aside from its faulty analysis, which shall be further detailed below, the "accident" requirement was expressly removed from the WDCA by amendments enacted in 1943. That was the holding of this Court in the watershed case of *Sheppard v Michigan National Bank*, 348 Mich 577; 83 NW2d 614 (1957). No longer does the analysis look for something unexpected, fortuitous, out of the ordinary, or beyond the risks of everyday life to establish compensability.

Although not expressly saying so, defendant would have this Court resurrect this doctrine. Its current argument is the "accident" standard, scarcely even repackaged. This is clearly inappropriate. The Legislature removed the "accident" requirement from the WDCA nearly 60 years ago. *This* is the legislative repudiation defendant Faircloth finds lacking relative to *Van Gorder*. If any holding has been acquiesced in, it is the holding in *Ledbetter v Michigan Carton Co*, 74 Mich App 330; 253 NW2d 753 (1977), which remained untouched despite extensive amendments during 1980, 1981, and 1987.

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[7]See *Wilson v Phoenix Furniture Co*, 201 Mich 531; 167 NW 839 (1918); *Crosby v Thorp, Hawley & Co*, 206 Mich 250; 172 NW 535 (1919); *Williams v Missouri Valley Bridge & Iron Co*, 212 Mich 150; 180 NW 357 (1920).

[8]*Twork v Munising Paper Co*, 275 Mich 174; 266 NW 311 (1936).

Since *Van Gorder* is based upon outdated and superseded legal principles, it is obviously no longer valid precedent.[9] Furthermore, it was based upon a fault reading of English law to begin with.

When the WDCA was first enacted, it was commonly construed by reference to English law, from which the Michigan law was largely derived. *Hills v Blair*, 182 Mich 20, 25; 148 NW 243 (1914); *Adams v Acme White Lead & Color Works*, 182 Mich 157; 148 NW 485 (1914). *Van Gorder* was based on the 1917 Supreme Court's belief that the English case of *Wicks v Dowell & Co, Ltd*, 2 KB 225 (1905), had been limited by subsequent English decisions.[10]

In *Wicks*, compensation was granted where an employee suffered an epileptic fit while loading a ship, fell into the ship's hold, and was severely injured (10b). The Court held that the fact that the "remote cause" of the injury was an idiopathic condition did not erase the contributions of the employment that placed the employee where he was when he fell:

> "Then did the accident arise out of the man's employment? When we get rid of the confusion caused by the fact that the fall was originally caused by the fit and the confusion involved in not dissociating the injury and its

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[9]*Van Gorder* may not stand for the principle for which it is cited in any event. It seems clear that the *Van Gorder* Court did not believe that the fall in that matter, from what was characterized as "only a short distance," made any difference in the outcome. As a result, this is no different than the level floor situation adjudicated in *Ledbetter*, and any further analysis would constitute dicta which is not binding on this court. *Cree Coaches, Inc v Panel Suppliers, Inc*, 23 Mich App 67; 178 NW2d 101 (1970). If this is the case, *Van Gorder* is not inconsistent with the result reached below.

[10]Copies of all English cases cited are included in plaintiff's appendix.

> actual physical cause from the more remote cause, that is to say, from the fit, the difficulty arising from the words "out of the employment' is removed. How does it come about in the present case that the accident arose out of the employment? Because by the conditions of his employment the workman was bound to stand on the edge of what I may style a precipice, and if in that position he was seized by a fit he would almost necessarily fall over. If that is so, the accident was caused by his necessary proximity to the precipice, for the fall was brought about by the necessity for his standing in that position. Upon the authorities I think the case is clear: an accident does not cease to be such because its remote cause was the idiopathic condition of the injured man; we must dissociate that idiopathic condition from the other facts and remember that he was obliged to run the risk by the very nature of his employment, and that the dangerous fall was brought about by the conditions of that employment. I think, therefore, that the present case comes within the purview of the Workmen's Compensation Act..." *Id*, at 229-230 (12b-13b).

This reasoning would apply equally well to require an award in the instant case.

However, the *Van Gorder* Court held that the *Wicks* holding had been restricted by subsequent decisions in *Butler v Burton-on-Trent Union*, 5 BWCC 355 (1912) (28b-29b), and *Nash v Owners of SS Rangatira*, 3 KB 978 (1914) (22b-27b), although neither even so much as mentioned *Wicks*. However, both *Butler* and *Nash* involved specific and limited circumstances[11], and *Nash* was subsequently limited itself in *Bulmer v SS Baluchistan*, 27 BWCC 399 (1934) (30b-34b).

More importantly, the English Court subsequently held that *Wicks* would indeed have applied in a case like this one. In *Martin v Finch*, 30 BWCC 99 (1937), the Court

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[11] *Butler* involved an individual injured while not actively working (29b), while *Nash* concerned an employee whose intoxication was held to be the sole cause of his injury (24b).

considered a situation in which an employee died after falling off a bicycle he was using to deliver tools for his employer, apparently as the result of an epileptic seizure (15b-17b). In applying *Wicks*, the Court offered reasoning strikingly similar to that utilized by the Court of Appeals in the instant case:

> "It is not merely the fact that he had the epilepsy which caused the accident, it was the combination of the fact that he had this tendency to epilepsy coupled with the fact that he was in an unstable and dangerous position, being on a machine which of its very nature was dangerous in its state of unstable equilibrium, a bicycle traveling at a speed on a road.
>
> "To my way of thinking it is the same problem as arose in *Wicks v Dowell & Co, Ltd.*" *Martin, supra*, at 107 (footnote omitted) (18b).

Again, the same reasoning could apply to a diabetic reaction in a moving automobile. Just as clearly, the *Van Gorder* Court misread and unfairly limited *Wicks*.

Van Gorder simply is no longer good law. It is wrong, it has been overruled, and it should be expressly rejected by this Court. The doctrine it propounds, that some danger out of the ordinary or beyond the risks of everyday life is required to establish compensability, is no longer the law.

E. Any requirement that the consequences of a fall caused by an idiopathic condition be contributed to by a risk beyond that encountered in "everyday life" is both unsupported by the statute and unworkable.

As previously noted, the word "risk" does not appear in MCL 418.301(1), nor is there any language authorizing a risk analysis. In any event, such an analysis would not work.

In *Ledbetter v Michigan Carton Co*, 74 Mich App 330, 337; 253 NW2d 753 (1977), the Court gave as one example of a compensable situation a claimant's fall from a ladder resulting from an idiopathic condition. However, many, if not most, American homes have ladders in them. Does that mean that falling off a six-foot ladder would be considered a risk of "everyday life," so that such a fall on the job would not support an award? Many homes have higher extension ladders as well. Does that change the calculus? Where does the line get drawn in such a situation?

Taking another example, reminiscent of one used by the Court of Appeals below, consider a chef who cuts up food in the kitchen of a restaurant. If he slices off a finger, is that injury only compensable if he used a knife larger than that contained in the average home? Would he only get benefits if he was using a cleaver?

Quite obviously, this is absurd, introducing concepts nowhere mentioned in or permitted by MCL 418.301(1). This Court should not write in new language that is not now there.

F. Conclusion.

The Court of Appeals' analysis is consistent with general workers' compensation law. If plaintiff had simply been involved in an automobile accident while on company business, without any contribution from his diabetic condition, his accident would have been compensable without question and without regard for the cause of the accident (barring willful misconduct). *Ream v LE Myers Co*, 72 Mich App 238; 249 NW2d 372 (1976). No showing would have been required that "the risk posed by the employment situation must go beyond the common risks of everyday life."

Why should this case be any different? In fact, such a holding runs contrary to the well-established maxim that an employer takes its employees as it finds them. See, *e.g.*, *Sheppard v Michigan National Bank*, 348 Mich 577, 584-585; 83 NW2d 614 (1957); *Riddle v Broad Crane Engineering Co*, 53 Mich App 257, 260; 218 NW2d 845 (1974).

The *Ledbetter* Court held that an idiopathic fall on a level floor was not work-related, because the employment added nothing to the injury. If the employee in that case had been at home, in a shopping mall, or walking his dog, he would still have fallen on a level surface. The instant plaintiff's injuries were not the result of the personal risk, his diabetic reaction, but instead arose because his employment placed him in a moving vehicle when it occurred. This is compensable, as the Court below properly held in this case: "As long as plaintiffs prove that the injuries for which they seek compensation are those resulting from the work-related vehicular accident rather than from the idiopathic condition, the injuries are recoverable" (407a).

Where an incident occurs on the job, but the job adds nothing whatsoever to it or in no way worsens its effects, the result is not compensable. By contrast, when the job places an individual in a car, and he or she ultimately gets into an automobile accident, work has added something, and a significant "something" at that. This is compensable as a matter of law. The WCAC erred reversibly in finding otherwise, and the Court of Appeals properly reversed its decision.

The Court of Appeals' decision should be affirmed by this Court.

RELIEF

WHEREFORE Plaintiff-Appellee JEFFREY L. FRAZZINI respectfully requests that this Honorable Supreme Court affirm the decision of the Court of Appeals, and further grant him any other relief to which he may be entitled.

Respectfully submitted,

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